

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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Court of Appeals of the District of Columbia.

JANUARY TERM, 1925.

No. 4255. **180**

MARIE PERRY, APPELLANT,

vs.

HUBERT WORK, SECRETARY OF THE INTERIOR, AND
WILLIAM SPRY, COMMISSIONER OF THE GENERAL
LAND OFFICE.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

FILED NOVEMBER 28, 1924.

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Court of Appeals of the District of Columbia.

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No. 4255.

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vs.

HUBERT WORK, SECRETARY OF THE INTERIOR, AND
WILLIAM SPRY, COMMISSIONER OF THE GENERAL
LAND OFFICE, APPELLEES.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
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Court of Appeals of the District of Columbia.

No. 4255.

MARIE PERRY, Appellant,

vs.

HUBERT WORK, Secy., &c., et al.

a Supreme Court of the District of Columbia

Equity. No. 40455.

MARIE PERRY, Plaintiff

vs.

ALBERT B. FALL, Secretary of the Interior, and WILLIAM SPRY,
Commissioner of the General Land Office, Defendants.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

1 *Bill of Complaint.*

Filed Aug. 28, 1922.

In the Supreme Court of the District of Columbia.

Equity. No. 40455.

, MARIE PERRY, Plaintiff,

vs.

ALBERT B. FALL, Secretary of the Interior, and WILLIAM SPRY,
Commissioner of the General Land Office, Defendants.

To the Honorable the Justices of said Court, holding a special term
as a Court of Equity.

The plaintiff states as follows:

1. That the plaintiff, Marie Perry, is a citizen of the United States, and a resident of the State of South Dakota, and brings this suit in her own right.

2. That the defendants, Albert B. Fall, Secretary of the Interior, and William Spry, Commissioner of the General Land Office, are both citizens of the United States, and temporarily residents of the District of Columbia, and are sued therein for acts done and threatened by them in their official capacities, respectively.

3. That on October 21, 1916, Marie Perry made an Enlarged Homestead Entry 033047, Rapid City, South Dakota, for the N. E./4 of the N. W./4, W./2 of the N. E./4, N. W./4 of the S. E./4, S. E./4 of the S. W./4 and S./2 of the S. E./4 of Section 8, and the S. W/4 of the S. W./4 of Section 9, Township 12 South, or Range 8 East, Black Hills Meridian, containing 320 acres.

4. That on June 9, 1919, Fred B. Humiston filed a contest against plaintiff's entry, charging that she had never established and maintained a residence on the land, and that she had never made any attempt to cultivate the land.

5. That notice of said contest was served on her when she was residing upon the land involved, with her child, on the 30th day of June, 1919.

6. That at the date of the service of such notice, a part of the land had been broken and she had a contract which was then being carried out to break forty acres of land, beginning June 23, 1919.

7. On the date set for hearing before United States Commissioner Palmer, the various parties appeared, but during the proceeding, plaintiff, Marie Perry, who was called by contestant as his witness, became ill and under orders of a physician had to be removed from the building wherein said hearing was being held; the hearing was proceeded with in her absence for a while, and then continued until November 17, 1919.

8. Plaintiff being sick and confined to her bed on November 17, 1919, the hearing proceeded to a conclusion, when her counsel requested that the case be held open until the final hearing so that if her physical ability and condition would permit she could be present before the Register and Receiver at such time or times as the Register and Receiver may designate, and thereby serve notice

3 that she would appear and requested to be permitted to appear at the final hearing if her physical condition would permit her to do so and if her physician deemed it advisable that she should appear, but that if her physical condition should be such as to render it unsafe or unwise, notice was given that the deposition of the claimant would be asked to be taken before some officer authorized to administer oaths and take testimony.

9. And plaintiff says that relying upon the Register and Receiver and her attorneys she waited expecting to receive notice to appear before them at such time as might be designated if physically able to do so, and if not, that they would take the proper steps to authorize the taking of her deposition to be used as evidence; but that wholly disregarding these reasonable requests without giving any notice to her or her counsel, they wrongfully and illegally took up and decided the case without giving her any opportunity whatever to appear before them or to have her deposition taken.

10. Her deposition was never taken and the plaintiff was not advised by her attorneys or otherwise of the action taken; her testimony first given as aforesaid was never completed, signed nor sworn to by her, nor was she given an opportunity to have her attorneys examine her nor to testify in her own behalf or explain her testimony.

11. On June 3, 1920, plaintiff filed a motion in the local office asking that a new trial be granted for the purpose of enabling her to appear and testify, and also furnish her an opportunity to offer newly discovered evidence tending to discredit the testimony of witnesses offered by the contestant, which motion was denied.

4 12. Appeal from the Register and Receiver's decision was taken to the Commissioner of the General Land Office, who sustained the local officers, giving special consideration to such testimony, and upon further appeal to the Secretary of the Interior, the contestant was again sustained, the decision being based upon such illegal, unread, unsigned and unsworn to report of the Commissioner only, as to what she stated.

13. Motion for rehearing of the Secretary's decision rendered on appeal from the decision of the Commissioner, supported by the affidavit of the contestee was denied by the Department, copy of which motion and attached affidavit is filed herewith marked Exhibit "A" and by reference made part hereof.

14. In accordance with the information transmitted to her by the departmental letter to Senator Norris, the plaintiff filed a motion for the exercise by the Secretary of his supervisory authority, the setting aside of all decisions, dismissing the contest, and the reinstatement and sustaining of her entry.

15. On August 2, 1922, this motion was denied, the Department, among other things not pertinent to our motion, holding that,—“The contentions now made are along the same line as the argument made and considered prior to final action on the contest. Those of course were very carefully considered and fully discussed in the decision on appeal. All of the four decisions heretofore rendered by the local land office, the General Land Office and the Department have been uniformly against the contestee.”

16. And plaintiff says that she has now completely exhausted her right of appeal, rehearing and prayer for the exercise by the

5 Secretary of the Interior of his supervising authority in her behalf, in said Department and the said General Land Office, in respect of her claim to said land and that no further opportunity for hearing of the question aforesaid or for further assertion therein of her claim to said tract of land, is afforded by the regulations and rules of practice of said Department, or by any law or act of Congress in such case made and provided; and that her only remaining remedy is by appropriate appeal to the courts for relief from the rulings aforesaid, and which rulings, as plaintiff is advised by counsel, and accordingly so avers, are erroneous in matter of law.

17. Plaintiff denies there was ever any failure to comply with the law on her part, as charged in the affidavit of contest. It is ad-

mitted and nowhere disputed that at the time of service of the notice of contest on her, she was and for sometime previous thereto had been residing upon the land with her daughter and for some days prior to such service she had one Fryberger engaged in breaking the land under a contract to break forty acres and that notwithstanding frequent efforts it was her first opportunity to get breaking done, thus curing laches charged, if any had ever existed.

18. That as shown in her affidavit attached to her motion for rehearing (Exhibit "A") she was at a time absent from the land (in 1918) having had an attack of influenza which left her in a very weakened and frail condition of health, necessitating her absence for medical treatment, returning to the land the first of April, 1919, and because still too ill, she could not obtain necessary medical treatment within a reasonable distance, she was compelled to again be absent until June 23, 1919, when she resided continuously until the time of the hearing and has continued to reside since; that prior to the service of notice of contest, five days after her return to the land from
6 such treatment, viz., (June 30, 1919), and after the greater portion of the forty acre contract of breaking was completed, she had no notice or information from any source that such contest had been filed.

19. That under the law and the rules and regulations it was illegal and wrongful in Commissioner Palmer to consider and transmit as evidence the questions and answers of plaintiff when she was called as a witness for the contestant, first, because of its non-completion caused by her illness and removal from the building on physician's orders, and second, because the extended shorthand notes thereof were never presented to her for signature and verification, and therefore absolutely void as evidence in the case.

20. That it was illegal and wrongful to take up and decide the case without giving her notice of their intention to do so, as requested by her counsel, in the notice given at the time of concluding evidence of witnesses present at the adjourned taking, it being conceded she was still too ill to attend.

21. That it was illegal and wrongful for them to transmit such paper to the General Land Office as a part of the evidence in the case and likewise illegal and wrongful for the Commissioner and the Secretary to consider it as evidence in all their decisions.

22. That it being admitted she was complying with the law as to all charges made in the affidavit at the date notice of contest was served on her, and there being *no evidence whatever* that she had any *actual knowledge* of the filing of the affidavit prior to date of such service, it was illegal and wrongful for the Department to hold that her return from her absence for medical treatment was "hurried by what it is stated was a *possibility* she might have known, of its filing, and holding this was sufficient to sustain the *burden of proof*, not only that she had *knowledge* of the filing of the affidavit, but that it was the cause of what they are pleased to term "her hurried return to the land."

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23. It was illegal and wrongful for the Department to so hold

when it must be conceded such action on her part was in accordance with the law and was her duty.

24. It being conceded there was no evidence in the record to sustain the holding that plaintiff had any such notice, knowledge or information, nor to show her return to the land was "hastened" by a fact of which it is not shown she had actual knowledge, it was wrong and illegal to hold these facts, *essential to the case of the contestant*, without any evidence whatever, sustained the burden of proof in a case involving forfeiture.

25. As shown, it was illegal and wrongful for the Department to hold, *without any evidence whatever*, but merely upon presumption, that her failure to cultivate the land earlier was in bad faith, for the sole reason, as stated, that she had brothers who would have cultivated it, if she had been acting in good faith, when her motion for rehearing, duly verified was in the record, showing she made efforts to get them to do breaking in 1917, 1918 and 1919, without avail.

In view of the foregoing facts, the action of the Department in canceling her entry and allowing Humiston preference right to make entry, the exercise of which right was permitted over protest of other parties, while her motion for the exercise by the Secretary of
8 his supervisory authority was pending undisposed of, was capricious and arbitrary.

27. The Plaintiff avers that she is advised by counsel, and therefore alleges that it was the duty of the said defendants, the Secretary of the Interior, and the defendant, the Commissioner of the General Land Office to dismiss the contest of Fred D. Humiston against her entry upon the ground that it is conceded she had cured any laches charged in the affidavit of contest before service of notice and without any evidence whatever that she had any actual knowledge or information as to the filing of the affidavit of contest at any time prior to the date of service upon her, at a time when she was residing on the land with her little girl and having the land cultivated, and leave her entry intact upon the records.

28. And plaintiff further avers that it was illegal, wrongful and arbitrary for said defendants in the absence of any evidence whatever to presume, assume and decide without any evidence whatever, except the illegal presumption stated by them, that because of her return to the land from an absence for medical treatment prior to the service of notice of the contest, that it might have been the reason for her return.

29. That plaintiff further avers she did not have a fair hearing and trial, for the reason that at the time of the hearing on the affidavit of the contest, having been in frail health for a long time, and while testifying as a witness for the contestant at the opening of the hearing, she became so ill that her physician ordered her to discontinue her testimony and be removed from the building, and her testi-

mony was never continued thereafter; that the hearing was
9 proceeded with for a time in her absence and later was set down for continuance on November 17, 1919, at which latter date she was still too ill to attend the hearing, yet the Commissioner ordered that the hearing be proceeded with, which was done; at the

conclusion of which hearing her counsel asked that the case be held open for the final hearing at which time plaintiff would appear in person and testify if she was physically able to do so, and if not able to appear in person at the final hearing, request would then be made for the issuance of a commission to take her deposition. Regardless of this notice and request the Register and Receiver passed upon this defective, imperfect record, without any notice whatever to plaintiff or her attorney of the final hearing having consideration.

30. And plaintiff further avers that the defendants are now threatening to issue patent to said Fred D. Humiston upon his entry allowed by the Department for said land.

31. And plaintiff further avers that the said Fred D. Humiston is not a resident of the District of Columbia, and is not under the jurisdiction of this Court, and that the plaintiff is entitled to patent for said land.

32. The plaintiff avers that by reason of said illegal actions of the defendants the Secretary of the Interior and the Commissioner of the General Land Office, in cancelling her entry and allowing the entry of said Humiston, and the threatened action of the defendants to issue patent to him for said land, she, the plaintiff, is being irreparably damaged in this, that the record title to her said described land has been mutilated, and by reason thereof she has been and is now and until relief shall have been afforded her by the Honorable

10 Court, will continue to be disturbed in her quiet possession and enjoyment of said land, and by reason of the great faith and credit reposed by the general public in the acts and doings of officials of such high degree, the title to her said land has by their aforesaid acts become clouded and the market value thereof greatly lessened, and unless restrained therefrom by this Honorable Court, the defendants will assume the right of authority to issue a patent for said land to the said Fred D. Humiston to the further injury of the plaintiff.

The premises considered, the plaintiff prays as follows:

First. That the United States Writ of Subpœna issue out of this Honorable Court, directed to the Defendant, Albert B. Fall, Secretary of the Interior, and the Defendant, William Spry, Commissioner of the General Land Office, commanding them and each of them to be and appear in this Court on a day certain therein named to answer the exigences of the Bill and to abide the judgment of the Court.

Second, That pending the final hearing of this cause, the Defendants, and each of them, may be restrained and enjoined from issuing a patent for said land to the said Fred D. Humiston, or to any other person except the plaintiff, as by law provided.

Third. That upon the final hearing of this cause, the defendants may be perpetually enjoined and restrained from issuing a patent for said land to the said Fred D. Humiston or to any other person than the plaintiff; that the defendants may be commanded and enjoined to cancel upon the records of the General Land Office the entry of Fred D. Humiston; and to reinstate and restore to the records the entry of the plaintiff so wrongfully and illegally canceled as aforesaid, and to permit her to take such other steps as may be required by law to entitle her to a patent.

11 Fourth. And that the plaintiff may have such other and further relief in the premises as the nature of the case may require and to this Honorable Court may seem meet and proper.

MARIE PERRY,
Plaintiff.

S. M. STOCKSLAGER,
Her Attorney.

505 McGill Bldg., Washington, D. C.

STOCKSLAGER & HEARD,
Attorneys for Plaintiff.

Service of the above and foregoing complaint acknowledged this 28th day of August, 1922.

EDWIN S. BOOTH,
Attorney for Defendants.

DISTRICT OF COLUMBIA, ss:

I do solemnly swear that I am one of the attorneys for the person named as plaintiff in the foregoing bill of complaint; that I had read said bill and know the contents thereof and that the facts therein stated as of personal knowledge are true, and those stated as upon information and belief I believe to be true.

S. M. STOCKSLAGER.

Subscribed and sworn to before me this 26th day of August, 1922.
[SEAL.]

CHARLOTTE B. BULL,
Notary Public in and for D. C.

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EXHIBIT A.

Before the Honorable Secretary of the Interior.

FRED D. HUMISTON, Contestant and Respondent,

vs.

MARIE PERRY, Contestee and Appellant.

Involving H. E. Serial No. 033047, for N. E./4 N. W./4, W./2 N. E./4, N. W./4 S. E./4, S. E./4 S. W./4, & S./2 S. E./4 Sec. 8, S. W./4 S. W./4 Sec. 9, T. 12 S., R. 8 E., B. H. M.

Motion for Rehearing.

Now comes the contestee in the above entitled action and respectfully moves the Honorable Secretary of the Interior for a rehearing of this case, in which a decision was made November 10, 1921, upon the following grounds, to-wit:

1. Error in holding that a new trial should not be granted as defendant's "substantial rights were not injuriously affected", in the face of the fact that she was the defendant, had within her knowledge

peculiar and controlling facts not known by any other witness, and she being too sick not only to attend the hearing and testify, but too sick to even direct the case.

2. Error in holding that she had "ample opportunity and time" to furnish a deposition, in the face of the facts now shown, that through the negligence of her attorneys and their inattention to her business she was mislead to her great prejudice without fault on her part.

3. Error in holding that the personal presence of her brother at the trial prevented injury to her on account of her absence.

4. Error in holding that the rule is well settled that a new trial will not be granted simply to give a party an opportunity to impeach or discredit witnesses for the opposite party, and in applying same to the facts in this case where the party is the party directly in interest and through an unavoidable cause cannot be present at the trial.

5. Error in holding that defendant's residence was insufficient, she having been denied the right to testify, the overwhelming evidence conclusively proving the contrary, and in the face of the admitted fact that several of contestant's witnesses were prompted by motives of revenge and promptings to keep alive a factional quarrel and were the aggressors, and in the face of admitted perjury, tainting all of contestant's evidence.

6. Error in drawing the unwarranted and wholly unsupported and voluntary conclusion that if she had a "bona fide desire" to cultivate her land "it seems reasonable to suppose" that some one of her brothers would have come to her relief, in the face of the undisputed and conclusive testimony that for nearly three years she ex-
13 hausted every available means to obtain her brothers and all the neighbors, but without success.

7. Error in voluntarily concluding that she hastened to her land after the filing of the contest, aware of her failure to comply with the law, there being not one word to support this statement.

8. Error in failing to find the land grazing in character and the law fully complied with.

9. Error in utterly ignoring the positive, undisputed and conclusive evidence that she was living on the land in good faith when the Notice of Contest was served and that her default, if any, as to cultivation was completely cured before the papers were served upon her, there being not one word in the record showing or tending to show knowledge of the contest at the time of commencing cultivation.

Ex. A.

Before the Honorable Secretary of the Interior.

FRED D. HUMISTON, Contestant and Respondent,

vs.

MARIE PERRY, Contestee and Appellant.

Involving H. E. Serial No. 033047.

Affidavit.

STATE OF NEBRASKA,

County of Dawes, ss:

Marie Perry Sheldon, being first duly sworn, on oath deposes and says: That she is the defendant in the above entitled contest and that since the trial of said contest she married O. A. Sheldon and that her present name is Sheldon.

Affiant further deposes and says that at no time during the trial of this action was she able to personally testify as to her residence upon her homestead Serial No. 033047 or as to her cultivation or her intentions, and has been denied the opportunity to show her entire good faith in all matters pertaining thereto; that on account of contracting the "Flu" in 1918 she was very frail and weak at the time of the trial of this cause and on such account fainted soon after examination began; that on November 17, 1919, the date to which said hearing was continued she was still in bed and very frail and weak and wholly unable to testify or even to direct in any manner the trial of her said cause. That at said time she had employed Lee Card of Chadron and B. D. Mintener of Rapid City, South Dakota, as her attorneys, and she necessarily left everything in their charge. That said attorneys informed her on or soon after November 17, 1919, that she would have an opportunity to give her deposition, and

14 informed her that they would attend to the matter fully for her and would inform her the date of such hearing.

That affiant, relying implicitly upon the statements so made by her attorneys, waited and waited confidently expecting her deposition to be taken and that her attorneys were attending to her interests, and the first intimation she had to the contrary was a decision made by the Register and Receiver in the case adverse to her.

That affiant used all due diligence in her effort to give such testimony and implicitly believed that her attorneys would keep her fully informed regarding it, but that neither of said attorneys at any time have informed her that the case might be decided by the Register and Receiver without her testimony, and affiant further states the fact to be that her attorneys were careless and negligent and acted wholly without regard to the interests of this affiant in the matter of taking said deposition, and affiant feels confident that her own testimony would have changed the decision and the result

thereof. That said negligence on the part of her attorneys was owing to no fault of her own and wholly without her knowledge or consent until too late, and that she by reason of their negligence and gross inattention to her business is now made to suffer unless a rehearing is given in this case and her rights protected.

That affiant states the fact to be that her testimony briefly and in substance would have been as follows:

That she is very frail and in poor health; that she has no financial means with which to support herself and small child; that when she filed on this homestead she purchased all the buildings and improvements thereon, paying about \$700.00 therefor, which payment took nearly all of the ready cash which she had accumulated. That she established her residence on the land in April, 1916, before the entry had been allowed, and resided there continuously until the latter part of September, 1916; that she returned to the land and again began to reside thereon about March 1, 1917, and resided there continuously except for very short absences until about December 1, 1917, when she left for a short period, and again returned in the Spring of 1918, about the 1st day of April and resided there continuously until April, 1919, and then because of very poor health and need of medical treatment which she could not obtain within reasonable distance of the said homestead she was caused to be absent therefrom until June 23, 1919, and thereafter resided on her homestead continuously until about the time of the trial of this case; that she had returned upon her homestead prior to the service of any papers upon her and without any knowledge or information from any source that a contest had been filed against her entry.

That during all of the time she was so residing upon her homestead and maintaining her home there in good faith her house was well furnished, with provisions and ordinary necessities of life, comfort and conveniences, and that her house was at all times in good repair and entirely habitable, with the exception of a short time after Harry Tayman stole and removed her windows and took them away during her absence, and that during said time she kept a small flock of chickens, and that at times she would go out for brief
15 intervals nursing in order to earn money with which to improve and maintain her homestead. That she rented her land a portion of the time for \$150.00 per annum, and that the same was grazed and that considerable hay was made thereon. That in 1918 and 1919 she had a mile and a quarter of three-wire fence with posts about one and one-half rods apart constructed thereon at a cost of about \$200.00; that she tried to get parties to break the land during the years 1917, 1918 and 1919, and was unable to get any person to do any breaking thereon until June 25, 1919, at which time and during the next few succeeding days forty acres of land were broke thereon by one Fryberger, and that affiant's brother planted most of same to corn and turnips right after said breaking in 1919, placing a crop thereon, but that on account of drouth no crop was harvested and only a small portion grew; that

the greater portion of said breaking was done prior to the service of the contest papers upon this affiant and without any notice or information from any source that such contest had been filed. That affiant had especially requested her brothers to do the breaking in 1917, 1918 and 1919, but that they refused to do so for the reason that they were not equipped to perform such work; that W. B. Sharp contracted to do the breaking in 1917 and hereafter refused to do so; that affiant and her brothers attempted to procure several other neighbors in that vicinity to do the breaking, but could not do so, and used every means within her power to get same done without avail and wholly without fault on her part, being hindered by causes wholly beyond her control. That said land is properly grazing land and more valuable for grazing land than agricultural land, and that same has been grazed, rented and used during the full time by this affiant; and affiant will testify if a new trial is granted that Harry Tayman, one of the contestant's witnesses, told one Elmer Gilmore of Chadron, Nebraska, in the hearing of this affiant that the reason he swore so hard against this affiant at the trial is that he did not like her brothers. That the improvements on affiant's homestead have been kept in good repair, and that the reasonable value of all the improvements, including the breaking, is at least \$1,000.00. That Harry Tayman and Mary Tayman, who testified in behalf of contestant, testified absolutely false in every material matter involved in said case as to affiant's residence, and knowingly testified falsely; that affiant during all the time she lived upon her homestead rarely saw either of the Taymans driving their cattle across affiant's homestead.

Affiant further states that the road testified to as being northwest of her house is a distance of one-half of a mile to three-fourths of a mile from affiant's house, and that same is so far from her place that no one could tell whether any person was living on the place or not.

That the testimony of G. W. Barton on behalf of contestant as to affiant's residence was also entirely false as was the testimony of the contestant and his son Floyd L. Humiston; that all of the witnesses who testified of affiant's non-residence in behalf of contestant wilfully testified falsely.

16 That in affiant's neighborhood there has existed for several years a bitter factional quarrel, in which the Taymans, Barton, Wilson and Humistons are arrayed on one side and her brothers arrayed upon the other; that the Taymans and Humistons are persons who will testify to anything in order to win their point, and cannot be believed as to truth and veracity; that affiant has kept out of said factional quarrel, and although those arrayed against her brothers in such quarrel have not neighbored or associated with her, yet this affiant has done nothing to cause any ill will against her on the part of any one of such persons, and has attempted to keep out of said quarrels as far as possible.

For all of said reasons this affiant has been irreparably damaged should her motion for a rehearing be denied, and especially by the

gross negligence of her attorneys and the direct perjury of the witnesses for the contestant.

That affiant attaches hereto and makes a part of this affidavit the affidavit of G. W. Barton, one of contestant's witnesses, in which he now admits that he perjured himself at the trial and tells what he would swear to in case another trial is granted, all of which testimony would be entirely favorable to this affiant and in accordance with the actual truth, and affiant states the fact to be that she is the victim of a conspiracy on the part of the contestant and his witnesses and that a great injustice has been done whereby, all caused without any fault on her part and wholly without her knowledge and all of which was wholly unavoidable in so far as she was concerned.

That if a rehearing in this case is allowed and affiant is permitted to have her day in court, she can produce a large amount of testimony showing that the contestant and his witnesses wilfully perjured themselves in the former trial and that the decision rests upon perjury and not upon actual facts, and that the facts are in all things as hereinbefore stated by affiant.

That affiant attaches hereto and by reference makes a part hereof Exhibit "B," being a certified copy of the records of the County Court of Daws County, Nebraska, in an action wherein the contestant Humiston caused the arrest of affiant's brother, Michael Egan, Jr., and which arrest is shown to be wholly without merit, and which shows the tactics pursued by the contestant Humiston and those in league with him.

That affiant's testimony and that which she can now produce to show the falsity of contestant's claim is of such a character that justice requires it and that it should be submitted to the Department that justice may be done, and which testimony will be produced by affiant if a new trial is given, the nature of which affiant deems to be conclusive.

Wherefore, Affiant prays that this affidavit be accepted as a part of the motion for rehearing submitted herein, and that her motion for rehearing be in all things granted and that upon rehear-
17 ing a new trial be ordered that affiant may be relieved from the result of the negligence and misinformation given her by her said attorneys and from the conspiracy and perjured testimony on the part of the contestant, all of which she is now able, willing and ready to submit if opportunity be granted.

(Signed)

MARIE PERRY SHELDON.

Subscribed and sworn to before me this 13th day of December, 1921.

[SEAL.]

(Sgd.)

CECIL W. LYON,
Notary Public.

Motion to Dismiss.

Filed Sep. 25, 1922.

Come now the defendants by their attorney and move to dismiss the bill of complaint herein filed on the grounds:

(1) That it is bad in substance in that it does not set forth sufficient facts to entitle plaintiff to the relief sought or to any relief in equity;

(2) that, as appears on the face of the bill, Fred D. Humiston is an indispensable party to this suit in whose absence said suit ought not to proceed;

(3) that as further appears on the face of the bill, the suit seeks, and involves, the direct review of the actions of the defendants in administering the public land laws of the United States and their judgment rendered in a controversy pending before them between the plaintiff and the said Fred D. Humiston as to a matter within the exclusive jurisdiction of the defendants and involving the exercise of their judgment and discretion;

18 (4) that if in the adjudication of said controversy the defendants have committed error of law as alleged in the bill of complaint and so patent the land to the said Humiston, plaintiff has the usual complete and wholly adequate remedy, to wit, a suit against said Humiston to charge said patent with a trust in her favor.

ALBERT B. FALL,
Secretary of the Interior;
WILLIAM SPRY,
Commissioner of the General Land Office,
By Their Attorney, C. EDWARD WRIGHT.

Memorandum.

March 12, 1923.—Order substituting Hubert Work in the place and stead of Albert B. Fall, as Secretary of the Interior, filed.

Memorandum Opinion.

Filed April 19, 1924.

The motion to dismiss will be sustained upon the first and second grounds thereof.

BAILEY, J.

Decree Dismissing Bill.

Filed April 25, 1924.

This cause came on to be heard on the motion of the defendants to dismiss the bill of complaint herein filed and was argued by counsel; Whereupon the court being fully advised in the premises it is this 25th day of April, 1924,

19 Ordered, adjudged, and decreed that the bill of complaint be, and the same hereby is dismissed, with judgment for costs to the defendants to be taxed by the clerk.

By the Court:

JENNINGS BAILEY,
Justice.

And now on the day last above written the plaintiff in open Court notes an appeal from the foregoing decree to the Court of Appeals of the District of Columbia and the same is hereby allowed, the penal sum of the bond for costs being fixed at \$100 with leave to the plaintiff to deposit the sum of \$50 in cash, in lieu thereof, with the clerk.

By the Court:

JENNINGS BAILEY,
Justice.

Memorandum.

May 13, 1924.—Bond on appeal by plaintiff for \$100 approved and filed.

20 *Assignment of Errors and Designation of Record on Appeal.*

Filed May 19, 1924.

Hon. Morgan H. Beach,
Clerk Supreme Court,
District of Columbia.

SIR:

On behalf of the above-named plaintiff and appellant, I request that you will cause to be prepared the Transcript of the Record on Appeal in the above-entitled cause; and I hereby designate the following to be included in said transcript:

1. Bill of Complaint including Exhibit "A" (paragraph 18).
2. Motion of defendants to dismiss the Bill of Complaint.
3. Memorandum decision and decree dismissing the Bill of Complaint, including endorsement thereon of appeal in open court and order fixing the amount of appeal bond for costs.
4. Assignment of Errors.

5. Memorandum of approval and filing of bond for costs on appeal.

6. This designation.

S. M. STOCKSLAGER,

Attorney for Appellant.

21 The appellant, Marie Perry, hereby designates the following assignments of error in a certain final decree of the Court, entered in the above-entitled cause April 25, 1924, dismissing the Bill of Complaint filed therein by plaintiff:

1. The court erred in rendering decree and judgment for the defendant.

2. The court erred in not rendering judgment for the plaintiff.

3. The court erred in sustaining the first and second paragraphs of the motion to dismiss the Bill of Complaint, for the reasons therein stated, or for any other reason.

4. The court erred in not holding that all charges of failure to comply with law designated in the contest affidavit of Humiston, if any ever existed, were by full compliance with the law cured prior to service of notice of contest upon her, leaving nothing to contest.

5. The court erred in not holding that it was error to consider any part of the plaintiff's testimony which was not completed because of her attack of illness while called as and testifying for the defendant and was prohibited by her physician from continuing, the record of which evidence was never signed or even seen by her, and although wholly illegal was transmitted to and considered by the Department in its decision as part of the legal record.

6. The court erred in not holding that it was error for the register and receiver to overrule her motion for rehearing of their decision for the reasons therein stated on account of which she did not have a fair hearing, and which decision was affirmed by the Department.

7. The court erred in not holding the defendants illegally, wrongfully, arbitrarily, and capriciously canceled plaintiff's entry without any legal evidence and allowed Hummiston to make
22 entry without any evidence and without any right whatever.

8. It being admitted in all of the departmental decisions that her return to, and cultivation of the land prior to service of notice of contest, cured any failure therein and defeated the contest; it being also conceded in such decisions that there is no evidence whatever that her return and cultivation of the land was hastened by its filing or that she had knowledge of its existence at any time prior to such return, but is based wholly upon mere conjectures that she might have had actual notice and that it might have hastened her return, it was error in the Court to not hold such findings and decisions were without evidence, arbitrary and baseless. (I. C. C. vs. L. & N. Ry. Co. 227, U. S., 88, and U. S. v. Rose, 92 U. S., 3 Otto, 281.)

9 The court erred in not granting the mandamus and injunction prayed for by plaintiff, and in dismissing the complaint.

Other reasons appearing on the face of the record.

S. M. STOCKSLAGER,

Attorney for Appellant.

Service of copy of the above and foregoing assignments of error acknowledged, this 17 day of May, 1924.

C. EDWD. WRIGHT,
Attorney for Defendants.

23 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Morgan H. Beach, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 22, both inclusive, to be a true and correct transcript of the record according to directions of counsel herein filed, copy of which is made part of this transcript in cause No. 40455 in Equity, wherein Marie Perry is Plaintiff and Albert B. Fall, Secretary of the Interior et al. are Defendants, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 29th day of October, 1924.

[Seal of the Supreme Court of the District of Columbia.]

MORGAN H. BEACH,
Clerk.

By W. E. WILLIAMS,
Asst. Clerk.

EW.

Endorsed on cover: District of Columbia Supreme Court. No. 4255. Marie Perry, appellant, vs. Hubert Work, Secy., &c., et al. Court of Appeals, District of Columbia. Filed Nov. 28, 1924. Henry W. Hodges, clerk.

COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

SEP 1 1925

Court of Appeals

OF THE DISTRICT OF COLUMBIA

JANUARY TERM, 1925

MARIE PERRY

Appellant.

v.

HUBERT WORK

Secretary of the Interior

and

WILLIAM SPRY

Commissioner of the General
Land Office

Appellees.

No. 4255.

BRIEF ON BEHALF OF APPELLANT

S. M. STOCKSLAGER,

Attorney for Appellant.

IN THE
Court of Appeals of the District of Columbia

January Term, 1925

No. 4255

MARIE PERRY,
Appellant

v.

HUBERT WORK
Secretary of the Interior
and

WILLIAM SPRY
Commissioner of the General Land Office

APPEAL FROM THE SUPREME COURT OF THE
DISTRICT OF COLUMBIA

BRIEF AND ARGUMENT FOR APPELLANT

This is an action for mandamus and injunction against the appellees in their official capacity, charged in the complaint with having taken the property of the appellant of which she was in possession under a valid legal title, and without a fair trial and without evidence, unlawfully and arbitrarily attempting to give it to one Fred. D. Hummiston, who had no valid claim of right whatever, under his contest proceedings.

QUESTIONS INVOLVED

Motion to dismiss the bill was filed, charging lack of necessary parties; that the Department had jurisdiction of the case and the decision was not arbitrary, and that plaintiff had an adequate remedy after patent should be issued for the land involved.

The Court submitted no opinion but sustained the motion for the first and second reasons, and rendered judgment of dismissal and did not consider the third and fourth reasons. Transcript page 14. Appeal was allowed, bond given, and assignment of errors and request for transcript filed in due time. Errors 3 to 9 both inclusive. Transcript 15 relied upon.

The complaint averred that Hummiston is a resident of South Dakota and could not be brought into the jurisdiction of this, the only court, in which this suit could be brought. As the motion to dismiss occupies the relation of a demurrer in the case, and admits the facts pleaded, the first question to be discussed is that of "lack of necessary parties" as shown by the complaint.

NOT A NECESSARY PARTY

As this case involves the disposal of public lands, unless Hummiston had a *valid legal right* acquired by compliance with the requirements of a statute providing in specific terms for its disposal, he could not be a necessary party. He contested the entry of the appellant which contest was sustained and subsequently he was permitted to make an entry in accordance with the law. He had no other connection with the land, was never in possession of it, but the contestee was, when the contest was brought, and still is, in full adverse possession. Counsel in his brief in the lower court asserted that the appellees had no "personal"

interest in the decision of the case. We fully agree with him on this point, but beg to go a step further, and suggest, however, that they did have a “*duty*” to perform. That duty has been plainly settled by our highest court as follows:

“The United States had no higher interest at stake than to establish the truth and justice of the transaction. It was due from it to these parties, whose estate this suit was instituted to defeat, to produce and examine as witnesses those who had had the best knowledge of the facts. *Colorado Coal & Iron Co. v. United States*, 125 U. S. 307; see also *Knight v. U. S. Land Association*, 142 U. S. 161.”

In this connection we are moved to inquire whether this duty made it incumbent upon them to put in a plea that he was a “necessary” party in this action which is against them *only* and in their *official* capacity? Is this not a discrimination against the appellant and in favor of Hummiston? One also which they knew if sustained would prevent further action since, in such cases, it is settled that it is impossible for appellant, by any process known to the courts to enforce his attendance, and thus, in effect, they deprive her of any action against *them*? It is not necessary to his protection, for he could intervene if his rights justified him; but when made a reason for dismissal by *them* it protects *him* against *her* in this action against *themselves*. They thus make a clear discrimination between the two claimants which is fatal to even *trying* the rights of one. Is this performing what the Supreme Court said is their highest duty? Can it be said that it is an effort to establish “truth and justice between the parties”; or is it a method of preventing continuance of the action? If he has any valid rights he

would intervene. He fought the case through the Department, and even after this action was commenced at her instance he was taking steps to make final proof and get possession when prevented from taking any further action by specific order of the Secretary of the Interior, *so long as this action is pending*, which was *official knowledge to him of its pendency*.

Again this case, as shown by the complaint, involves the forfeiture of more than \$1,000 worth of valuable improvements of the plaintiff. The Courts have settled the doctrine in such cases:

“A Court of equity abhors forfeitures, and will not lend its aid to enforce them. *Jones v. New York Guarantee Co.*, 101 U. S. 628.

“A Court of equity is always reluctant in the last degree to make a decree which will effect a forfeiture. *Union National Bank v. Mathews*, 98 U. S. 626.

“Equity never under any circumstances, lends its aid to enforce a forfeiture or penalty or anything in the nature of either. *Marshall v. Vicksburg*, 15 Wall. 149.

“It may be conceded that Courts of equity are always open to afford a remedy where there is an attempt under the guise of legal proceedings, to deprive a person of his life, liberty or property, without due process of law. *French v. Barber Asphalt Paving Co.*, 181 U. S. 345.”

But has he such an *interest* as to make him a necessary party? As hereinbefore stated, this case is based upon the record of the contest of Hummiston against the homestead entry of the appellant, it is important to examine the official construction by the department and the Supreme Court, of this statute, and particularly as to any rights, legal or equitable, obtained by the

contestant under his original entry allowed as the reward of his successful contest.

In the case of *Crook v. Carroll* (37 L. D. 513) the Department after quoting the act of May 14, 1880, known as the contest statute, said:

“The right given by this statute is in the nature of a reward to an informer, and the statute must be construed strictly.” Quoting *U. S. v. Connor* (138 U. S. 61), as follows:

“Whoever claims under such an offer must bring himself within its terms. Failing to do that, his compensation is the consolation which comes to every citizen from the discharge of a public duty which is the common obligation of all.”

Mr. Justice Brewer, speaking for the Court in that case which was that of an informer under act of 1866; said:

“Is the claim so meritorious as to justify a strained construction of the language of the statute? What did the claimant do? So far as appears he simply informed the officers and the government of a violation of one of the laws of this country * * * and is a mere act of public policy.”

That this broad unlimited offer in the act of 1880 “to anyone,” qualified to enter or not, was liable to great abuse is shown by the action of the Land Officers in making strict regulations, for this reason, as explained in 37 L. D. 513:

“It was adopted to prevent the allowance of unjustifiable attacks against entries, thus relieving the land department of the consideration of speculative and unwarranted contests and entrymen

from the trouble and expense attendant on the defense thereof.”

The Court in the case above quoted from further stated:

“Is it not clear that an offer of reward therefor is not the recognition of an equitable duty of the Government to the informer, but a mere act of public policy, the giving or withholding of which are wholly within the discretion of the Government. Claimant had no right before the repeal of the act of 1866. * * * Is it not clear that an offer of reward therefor, is not the recognition of an equitable duty of the Government to the informer, but merely an act of public policy, the giving or withholding of which, and whose terms are wholly within the discretion of the Government?”

In the case of Oscar O. Reeg (40 L. D. 206), the Department held:

The initial entry was merely a declaration of intention to acquire title to the land by performing the conditions required by the homestead laws * * * As against the Government his right is only conditional and inchoate. *Whitney v. Taylor*, 158 U. S. 85.

In *Hawley v. Diller*, 178 U. S. 476, the court said:

“Had his entry been valid, Shields would have taken only an equity. His grantees did not acquire the legal title.”

In *Frisby v. Whitney*, 9 Wall. 187, it is said that to

acquire any right against the Government by such filing or entry, it is incumbent upon the claimant to establish by sufficient proof to the satisfaction of the land department * * * That he has fulfilled the conditions required by the homestead laws and is entitled to a patent. Until such proof has been submitted and final certificate issued no right vests in the claimant. Citing with approval *Chalainin v. Santa Fe Pacific R. R. Co.* (42 L. D. 574), and *Mary C. Sands* (34 L. D. 653). The exact language used by the court in *Whitney v. Taylor*, *supra*, quoting approvingly *Johnson v. Tousley*, 80 U. S. (13 Wall. 2). See also *Rice v. Simmond* (43 L. D. 343).

“By neither the declaratory statement in the pre-emption case nor the original entry in a homestead case is any vested right acquired as against the Government. For each fees must be paid by the applicant and each practically amounts to nothing more than a *declaration of intention*” (italics ours).

On the other hand she paid \$800.00 for a relinquishment, made entry, established residence, added improvements and was entitled to patent when because of this contest her pending application for classification as stock-raising was unlawfully suspended. However, the record shows it was so classified by the Government prior to his entry as such, which does not require *cultivation*, and she was entitled by law to five months' absence each year, of the three requirements under that act.

WHO ARE INDISPENSABLY NECESSARY PARTIES?

The Supreme Court of the United States in *Minnesota v. Northern Securities Company* (184 U. S. 199), answers this question as follows:

1. Formal parties.
2. Persons having an interest in the controversy, who ought to be made parties to determine the entire controversy, but are not indispensable parties, and—
3. Persons that not only have an interest in the controversy of such nature that a decree without affecting that interest, or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience. They only are necessary parties.

Hummiston has no legal right to a patent. As contestant, he had no possible case against Mrs. Perry. He charged only failure in residence and cultivation. The contest dated from June 30, 1919, the day notice was served. At that time she was fully complying with both requirements and had been doing so for some days prior thereto. It follows, the charges were false and baseless and no rights could possibly be acquired through such contest. *Alice O. Reeder* (43 L. D. 196), and authorities cited; *Davis v. Eisbert* (26 L. D. 384), and authorities cited, and *Montgomery v. Newton*, 21 L. D. 15. There was no attempt made to approve the affirmative position, viz, that she had personal knowledge of the filing which alone induced her to hurry up. In her affidavit, a part of the bill, she swears she had no such knowledge but was ill in hospital at Hot Springs from April to the time she returned to the land without any personal knowledge of the filing of the contest.

Counsel for appellees in his brief in the lower court stated that he filed a decision of the Department and that the record was open to inspection by the court, citing *Santa Fe Pac. Ry. Co. v. Payne*, 50 App. D. C. 951; *U. S. v. Brewer-Elliott Oil Co.*, 229 Fed. 619, in

support thereof. Therefore, we have no hesitation in inviting the attention of the court to the departmental decision of November 10, 1921, on Mrs. Perry's appeal from the decision of the General Land Office. Referring to this point, it is said:

“If it be a fact as sworn to by the entrywoman at the hearing, that she had already resided on the land for seven months during each of the years preceding the filing of the contest; or if, as her brother generously swore, she had lived there practically continuously for eight or nine months during each of these years, there was no need for her to hasten her return to the land shortly after the contest was filed and the fact that she did so indicates that she was fully aware of the fact that she had theretofore failed to comply with the requirements of the law and left her entry open to a successful attack.”

The Department fails to state that she had a valid leave of absence from April, for five months, which covered this period and protected her from contest. This makes this most uncalled for suggestion appear little less than an absurdity. In C. Y. C., Vol. 20, p. 121, it is said:

“A charge of fraud cannot be sustained by mere insinuation and suspicion, strained inference, doubtful or suspicious circumstances or mere conjecture; and evidence which produces a vague misgiving is not enough.” See also *Morse v. Riddle*, 5 Cranch 23, by Chief Justice Marshall, wherein it is said:

“Fraud consists in intention and that inten-

tion is a fact which must be averred in a case of fraud. See also *U. S. v. Ross* (92 U. S. 3 Otto 281).''

Again it involved forfeiture of appellant's property which requires proof similar to that in penal cases. *Ewing v. Rickard*, 1 L. D. 146; *Cromwell v. Chilton* (1 L. D. 153); *Washington v. Watson* (2 L. D. 201), and *I. C. C. v. L. & N. Ry. Co.* (227 U. S. 588), it must follow as a legal proposition that Hummiston had no legal right whatever which is essential to his being a necessary party. Let us for a moment analyze the departmental decision quoted above.

First, it is charged in the bill and not disputed that at the date of service of the notice of contest on Mrs. Perry, she was residing upon the land with her little daughter and had a man breaking the land under contract to break 40 acres. This notice was not served until the 30th day of July, at which time, as above shown, she was living on the land and cultivating it and had been for a week or more. A long line of decisions hereinafter quoted settled the practice to the effect that if the contestee was complying with the law in the matters charged in the contest affidavit at the date of service, it is totally immaterial as to whether she had complied before that date or not, as it is held her laches, if any, were cured by such compliance. This being admitted, there was no possible way contestant could have legally recovered except by proving by a clear preponderance of competent evidence that she had personal knowledge and that this personal knowledge alone caused her to return to the land and begin the cultivation.

We challenge counsel to point to a single line of evidence sustaining what was absolutely necessary for him to prove to sustain his contest. This is frankly

admitted in the decision hereinbefore quoted to the effect that if she had been complying with the law as she and her brother stated, there was no reason for her to hurry up. Of course this is a mere play upon words. The writer must have known that it was immaterial whether she had complied or not if she was complying when the contest was served; and it was just as well known that she was complying and that there was no proof whatever that she had actual knowledge and there is no finding anywhere that she had.

We are thus met with a decision sustaining a contest without a single finding of any essential fact in favor of the contestant. Moreover, there is not only no finding of fact sustaining it but there is no evidence in the record sustaining any part of it. All these matters, together with the fact that she had no fair hearing, was pressed upon the Department time and again and on the lower court as well and yet there is no statement in any decision that any fact was found either by the Department or the lower court that was essential to sustaining the contest and forfeiting the property of the contestee. These are not mere assertions, we challenge counsel to show in what respect if any, they are not borne out by the bill and by the record.

CURING OF LACHES

If, therefore, there had been any failure theretofore, her laches were cured prior to date of service of notice, prior to which date no valid inquiry in his behalf could be made and all such efforts were and are immaterial and void of any effect. This being true, we are at a loss to understand how the Department and the lower court sustained the reason given in the motion that the court was without jurisdiction, because

the Department had jurisdiction and its finding of facts was "not arbitrary" and therefore conclusive upon the court; when as herein asserted, and as charged in the bill, there was no valid record before either tribunal, setting out fully the reasons that at the date the Department took jurisdiction, the only charges made were admittedly false and no proof of any essential facts made or stated, that while decisions were made, *no finding of any essential fact was made* in any one as to curing laches before notice is served. See *Hall v. Levy*, 11 L. D. 248; *Neal v. Cooley*, 18 L. D. 3; *Davis v. Seisbert*, 26 L. D. 384; also Keigwin's Notes Nos. 51, 57 and 58.

The allegation of failure to comply with the law does not furnish a basis for cancellation if not made until after the alleged default has been cured. *Montgomery v. Newton* (21 L. D. 15); *Kepner v. McCartney*, 11th L. D. 400; *Davis v. Fairbanks*, 9 L. D. 530, and *Slayton v. Carroll*, 7 L. D. 198.

As to the conclusiveness of the findings of fact by the Department where any is made, this is true only where it is shown there has been a fair trial and it is supported by some legal evidence. Unless this is shown, the courts will not sustain it. This is true even when the statute specifically makes the finding of the tribunal conclusive on the courts. *Lewis v. Friend* (233 U. S. 291); *I. C. C. v. L. & N. Ry. Co.* (227 U. S. 88). In the latter case Mr. Justice Lamar held:

A finding without evidence is arbitrary and baseless and is inconsistent with rational justice, and comes under the constitutional condemnation of all arbitrary exercise of power.

Cogio v. Uhl, 239 U. S. 3; *Gonzales v. Williams*, 102 U. S. 1; *Lake Superior Ship Canal Co. v. Cunningham*, 155 U. S. 354; *Johnson v. Riddle*, 240

U. S. 487; *Rockman C. & C. Co. v. Mitchell*, 245 U. S. 229; *Johnson v. Towsley*, 13 Wall. 287, quoting *McGolrick v. Lumber Co.*, 242 U. S. 632.

The second paragraph of the motion to dismiss the bill of complaint is as follows:

“That, as appears on the face of the bill, Fred. D. Hummiston is an indispensable party to this suit in whose absence said suit ought not to proceed.”

It is to be regretted that the trial court in his decision did not give us his views on the interest of Hummiston, which would make him an indispensable party to this suit by Mrs. Perry against the Secretary of the Interior and the Commissioner of the Land Office for mandamus and injunction against them. As the statute under which the original proceeding took place requires a strict construction, those who assert that he is a necessary party have the burden of proof. Professor Bunn, in the second edition of his work, “United States Courts,” page 59, lays down the following rule as to parties. Referring to Section 50 of the Code, he states:

“This section applies in the Federal Courts a liberal rule in favor of the jurisdiction to render judgment as between parties properly within the jurisdiction of the Court without the presence of others who would be simply *proper* parties. The objection, in other words, for want of parties in the District Court in cases where those parties are beyond the jurisdiction, will be sustained only when the absent parties are absolutely *indispensable* to the rendition of *any judgment*. *Clearwater v. Meredith*, 21 How., 489; *Barney v. Baltimore*

City, 6 Wall., 280; Camp v. Gress, 250 U. S., 308.”
See also Lane v. Watts (234 U. S. 525).

We have seen that Hummiston has no such interest in the controversy as would make him even a proper party, let alone an “essential” party. To have an interest sufficient, he must have a vested right. This he does not have. He has no interest in the land, as settled by the Department and Courts. He has no title of any kind, either legal or equitable. We have seen the Government can take whatever claim he has, without cause, without notice, and without any proceeding except an act of appropriation. How can it be contended that such a claimant is indispensable to a proceeding when he is out of the jurisdiction of the Court and refuses to intervene in his own behalf? (See full discussion in case of Rector v. Ashley, 73 U. S., 6 Wall., 1427).

This case differs from that of Brady and others cited by counsel wherein the Supreme Court held Mrs. Harner was a necessary party, for the reason that her claim was not that of a *contestant* seeking regard, but as having completed five years’ residence on the land and earned title; and also upon the additional ground that she was a deserted wife, and upon these two claims, and not upon any claim as a contestant, which she was not, the Court held she was a necessary party.

As the right given by statute is in the nature of a reward and involves forfeiture, it must be strictly construed. Cook v. Carroll, (37 L. D., 573) citing French v. Barber Asphalt Company, 181 U. S. 345. This requires not only the burden of proof that he is an indispensable party but such proof as is required in a case of forfeiture. Undoubtedly, these involve the possession of a vested interest in the controversy, as set out, in the complaint (Minnesota v. N. Securities Co., 184 U. S. 199); it also involves the showing why

the motion of appellees when the complaint shows he is out of the jurisdiction of the Court and that the appellant did all she could do and he fails to intervene should be sustained without any showing that he is an indispensable party and how without any interest whatever in the controversy he could be injured by any judgment of this Court; that this case can not be tried without injury to him although he has failed to show he has any vested interest; therefore, it is impossible for him to be injured by any judgment of the Court.

A vested interest is defined to be "an immediate right of present enjoyment, or a present fixed right of future enjoyment." C. Y. C., Vol. 40, page 198, quoting Black's Law Dictionary and citing Kent's Commentaries. It is also said a vested right is "an interest clothed with a present legal and existing right of alienation."

He has neither of these; he has been barred by the Secretary of the Interior from obtaining a present right of enjoyment, while this action is pending, and has no present fixed right of future enjoyment; neither is he clothed with a present legal and existing right of alienation, as whatever claim he has is not transferable. It follows clearly that he has no right whatever either in the land or in the controversy which would make him an absolute indispensable party under any definition.

It should not be necessary to discuss the proper practice of the Courts where lack of necessary parties is charged, as the complaint states contestant is not a resident of this District and not amenable to its jurisdiction. This is further rendered unnecessary by the fact that he has no interest in the land or in the controversy as settled by the Department, the Supreme Court and the definitions which we have quoted. In addition to all these, the utter failure to give appellant

a fair hearing renders the rule that the finding of facts, if any, by the Department, is conclusive upon the Courts inapplicable; it is also insisted that as it involves forfeiture, which "Courts of Equity abhor" and there being no evidence to sustain it, the Court may refuse to sustain it for that reason.

In *Marbury v. Madison* (1 Cranch 137) the great Chief Justice Marshall laid down and followed the English practice of taking jurisdiction where it was possible to do so without irreparable injury to non-residents, and thereby prevent future litigation. Thirty years thereafter (1833) the same great jurist in *Vattier v. Hind* (7 Pet. 752) amplified his views as follows:

"In the exercise of its discretion, the court will require the plaintiff to do all in his power to bring every person concerned in interest before the court. But if the case may be completely decided as between the litigant parties, the circumstance that an interest exists in some other person, whom the process of the court can not reach, as if such party be a resident of some other state, ought not to prevent a decree upon its merits. It would be a misapplication of the rule to dismiss the plaintiff's bill because he has not done that which the law will not enable him to do."

NO FAIR HEARING

What constitutes a fair hearing in proceedings in the Courts and the Executive Departments? It is guaranteed by the constitution and required by all Courts, in none more strenuously than in Courts of Equity. The Supreme Court in *I. C. C. v. L. & N. Ry. Co.* (227 U. S. 88) held:

“But the statute gave the right to a full hearing, and that conferred the privilege of introducing testimony, and at the same time imposed the duty of deciding in accordance with the facts proved. *A finding without evidence is arbitrary and baseless.* And if the Government’s contention is correct, it would mean the Commission had a power possessed by no other officer, administrative body, or tribunal under our Government. It would mean that, where rights depend upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however beneficially exercised in one case, could be injuriously exerted in another, is inconsistent with national justice, and comes under the Constitution’s condemnation of all arbitrary exercise of power.

“In the comparatively few cases in which such questions have arisen it has been distinctly recognized that administrative orders, quasi judicial in character, are *void if a hearing is denied; if that granted was inadequate or manifestly unfair; if the finding was contrary to the indisputable character of the evidence.*” (Italics ours.)

It is admitted the contestee did not have a fair hearing, as shown by the undisputed facts in the record. The fact that her testimony, given before she was taken ill and compelled by her physician, after she had fainted on the stand, to retire, was not written out by the stenographer and furnished her, either at the time of taking or at any time thereafter, and was not *signed nor sworn to*, but was used by the Department in its decisions as a basis therefor; as well as the failure of her attorneys as shown in her motion for rehearing, to keep her informed as to when her testimony might be

completed, is sufficient to establish the fact that there was no *fair hearing*. There is no respectable court in the land which would have made this illegal paper, called her testimony, a basis for a decision against her under all of the circumstances shown. She was denied the right to further testify.

Under instructions issued as early as 3rd L. D. 105, it was directed that "testimony must be written out and signed by witnesses at the time of taking it." This was followed in the same volume at page 121 by the following instruction: "Testimony taken in shorthand will not be accepted until *fairly written out and signed by the witness.*"

It shocks one's moral sense to be told that under a law of Congress an Executive Department is authorized to permit "any one" to contest the compliance of an entryman with his contract of purchase of public lands of the Government, by filing charges and paying the trifling costs of a proceeding called a contest, which, if successful takes the valuable property of the entryman and *gives it to this stranger to both the land, and the contract* with the Government; but more revolting still to our sense of fairness and justice it is to be told that when the entryman takes proceedings against the officials who are responsible for the action, in a Court of Equity charging unfairness and illegal action by *them* against *her* by which her valuable property is taken and given to such party without compensation, to be told by these officials that they cannot be called to account for *their* acts, because the man who has her property is out of the jurisdiction of the court and the Government which created the Court and made the contract has furnished no way to bring him in, and so long as he stays out he *keeps her property*, by *their* acts, and she is told that even *unfair* treatment by *them* can not be considered for the same reason.

Justice Matthews, speaking for this Court, in *Yick Wo. v. Hopkins*, 118 U. S. 536, 369, said:

“When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power.”

Our great Daniel Webster, in a speech made by him upon his returning to his native town speaking to his people, and pointing to the west, said:

“Yonder, my friends, you see a mountain whose peak rises above us; still farther west is another whose crowning point is higher still. Higher yet is the eagle’s flight; but above all is the eternal principles of justice.”

As our National Motto is “IN GOD WE TRUST,” and as He is the fountain of all justice, we have a right, not only to ask it, but it is due us and can not be denied without doing a grievous wrong.

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August 31, 1925.

COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

SEP 18 1925.

No. 4255

Henry H. Hodges
CLERK

**In the Court of Appeals of the District
of Columbia**

JANUARY TERM, 1925

MARIE PERRY, APPELLANT

v.

HUBERT WORK, SECRETARY OF THE INTERIOR, AND
WILLIAM SPRY, COMMISSIONER OF THE GENERAL
LAND OFFICE, APPELLEES

APPEAL FROM THE SUPREME COURT OF THE DISTRICT
OF COLUMBIA

REPLY BRIEF AND ARGUMENT FOR APPELLEES

O. H. GRAVES,
Attorney for Appellees.

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In the Court of Appeals of the District of Columbia

JANUARY TERM, 1925

No. 4255

MARIE PERRY, APPELLANT

v.

HUBERT WORK, SECRETARY OF THE INTERIOR, AND
William Spry, Commissioner of the General Land
Office, appellees

REPLY BRIEF AND ARGUMENT FOR APPELLEES

The lower court sustained defendant's motion to dismiss the bill. The plaintiff, appellant here, brings this appeal.

The bill details facts which lead to the unavoidable conclusion that an attempt was made to induce the court to review the action of the Secretary of the Interior and the Commissioner of the General Land Office in rendering judgment determining issues between private litigants. The defendants had only questions of fact to decide, and by the concurring decisions of all officers the fact has been determined that appellant did not comply with the requirements of law respecting either cultivation or residence. This

proceeding, therefore, is in the nature of a review or an attack upon a judgment of a court of last resort.

The original contest appears to have been duly heard after lawful notice by the register and receiver of the land office and his formal decision entered. Motion for new trial was denied. Appeals were taken in proper order to the Commissioner of the General Land Office and the Secretary of the Interior, on each of which the register was sustained and motion for rehearing denied. No contention is made that there was involved in said judgment a misconstruction of any applicable law whereby rights were denied, fraud perpetrated, or misrepresentations made inducing judgment.

Irregularities occurring upon the trial, as in the admission of testimony or the proper conduct of parties, are reviewable upon appeal and, in consequence of the record, are presumed to have been reviewed upon the various appeals herein taken. Therefore, the judgment has become final and the original case will not be reviewed by this court, nor merely upon a question of trial procedure will the court interfere with the judgment through the extraordinary remedies here sought to be invoked. See *Quinby v. Conlon*, 104 U. S. 420; *In re Emblem*, 161 U. S. 52; *Johnson v. Towsley*, 13 Wall. 72; *McBride v. Schurz*, 102 U. S. 378; *Brown v. Hitchcock*, 173 U. S. 473.

Humiston was the contestant in the original proceeding before the register of the land office. He prevailed against the appellant. He is entitled to

enjoy those rights or privileges accruing to him thereby. They can not be taken from him arbitrarily, and to any litigation involving those rights he must be a party or the court will be precluded from entering any decree or determination involving them or their validity. This proceeding being an attempt to readjudicate his rights—rights in which neither of the appellees have any interest—the presence of Humiston is imperative as the only party in interest, and the court can not involve such rights in his absence. It is not incumbent upon him to appear voluntarily in an adversary proceeding, but he must be brought into it by due process of law, and the fact that he is not subject to the jurisdiction of this court because of nonresidence is immaterial. See *Brady v. Work*, 263 U. S. 435; also *Cohen v. Fall*, 284 Fed. 734; *Foltz v. Payne*, 50 App. D. C. 155; *Heath v. Wallace*, 138 U. S. 573–585; *Dunlap v. Black*, 128 U. S. 40; *Borden v. Northern Pac. R. R. Co.*, 154 U. S. 288.

These decisions are fair. Why should the court proceed to adjudicate away the rights of Humiston in his absence when plaintiff, if aggrieved, has a remedy against him after patent issues? In such a suit she could assert and maintain all her rights and Humiston could defend his title—something he could not have done in this case. The Secretary has merely decided that, as between Humiston and Perry, Humiston has the greater right. That determination was made in a controversy between Humiston and Perry, both being heard. This suit, had the

court taken jurisdiction, would have been one sided. The court would have heard Mrs. Perry's side but not Humiston's. The Secretary's interest is not identical with Humiston's, any more than a *nisi prius* judge's interest is to be identified with that of an appellee in whose favor he decided.

The decisions are consistent that in a case like this a court will not interfere while a case is *in fieri* in the Land Department, but will await the time when patent issues transferring title from the United States to one of the parties and remit the complaining party to a remedy in a suit to charge the resulting patent with a trust. See *United States ex rel. Hall v. Lane*, 48 App. D. C. 279, and cases there cited.

Appellees contend, therefore, that the action of the Supreme Court of the District of Columbia in dismissing the bill should be affirmed.

O. H. GRAVES,
Attorney for Appellees.

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